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1           HTC CORPORATION

2           UNITED STATES DISTRICT COURT  
3           SOUTHERN DISTRICT OF CALIFORNIA

4           DATAQUILL LIMITED,

5           Case No. 3:08-cv-00543-IEG-BGS

6           Plaintiff,

7           v.  
8           **MEMORANDUM IN SUPPORT OF  
9           HTC'S MOTION TO EXCLUDE THE  
10          OPINIONS AND TESTIMONY OF  
11          JOSEPH GEMINI PURSUANT TO RULE  
12          702 OF THE FEDERAL RULES OF  
13          EVIDENCE [UNDER SEAL]**

14           HTC CORPORATION,

15           Date: April 9, 2012

16           Time: 10:30 a.m.

17           Location: Courtroom 1

18           Judge: Hon. Irma E. Gonzalez

19           Magistrate Judge: Hon. Bernard G. Skomal

20           Complaint filed: March 24, 2008

21           Trial Date: July 10, 2012

22           Defendant.

23

24           HTC CORPORATION,

25           Counter-Claimant,

26           v.

27           DATAQUILL LIMITED,

28           Counter-Defendant.

29           

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**MEMORANDUM IN SUPPORT OF HTC'S MOTION TO EXCLUDE THE OPINIONS AND  
30          TESTIMONY OF JOSEPH GEMINI**  
31           Case No. 3:08-cv-00543-IEG-BGS

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## L. INTRODUCTION<sup>1</sup>

On December 1, 2011, this Court granted HTC’s motion to preclude certain testimony of DataQuill’s damages expert, Mr. Joseph Gemini. It held that Mr. Gemini could not rely upon what he referred to as the “significant patent agreements”—agreements that HTC had entered into with giants of the telecommunications industry for patents essential to the practice of communications standards—in arriving at what he asserted to be an appropriate reasonable royalty for infringement of the patents-in-suit. Because this ruling eviscerated the core of Mr. Gemini’s opinion, DataQuill sought permission to submit a new expert report. The Court granted that request, and on January 31, 2012, Mr. Gemini served his Superseding Expert Report on HTC.

No longer able to rely upon HTC's agreements with industry giants to provide a justification for his opinion, Mr. Gemini has now cherry-picked [REDACTED]

to provide a purported basis for his view of the outcome of a hypothetical negotiation.

<sup>1</sup> References in brackets [ ] are to the consecutively paginated exhibits filed concurrently herewith.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] The Court has already held  
15 that agreements of this type do not provide a proper basis for calculating a reasonable royalty in  
16 this case.

17 This opinion is junk science at its worst. The Court should once again grant HTC's  
18 motion to exclude Mr. Gemini's testimony.

19 **II. BACKGROUND**

20 On July 16, 2011, DataQuill served the Expert Report of Joseph Gemini regarding its  
21 purported damages resulting from the alleged infringement of the asserted claims of U.S. Patent  
22 Nos. 6,058,304 ("the '304 patent"), 7,139,591 C1, and 6,058,304 C1 (collectively, "the patents-  
23 in-suit"). See Dkt. 135-2, Ex. 1 (Initial Gemini Rep.). Mr. Gemini used ten of HTC's licenses  
24 with industry giants (the so-called "significant patent agreements") to arrive at the extraordinary  
25 conclusion that HTC would have agreed to pay DataQuill [REDACTED]

26  
27 <sup>3</sup> See Declaration of William S. Hicks in Supp. of HTC's 3/12/12 Mot. to Exclude the Testimony  
of Joseph Gemini ("Hicks Decl."), Ex. 5 (transcript of 3/07/12 depo) at 490:6-14 [143].

1 [REDACTED]

2 On September 26, 2011, HTC moved to exclude Mr. Gemini's initial damages opinion,  
 3 among other reasons, because Mr. Gemini had failed to establish that HTC's "significant patent  
 4 agreements" were in any way comparable to the hypothetical agreement that would be reached  
 5 between the parties to the present suit. *See* Dkt. No. 135. On December 1, 2011, the Court issued  
 6 an order excluding Mr. Gemini's testimony to the extent he relied upon the "significant patent  
 7 agreements" to determine a reasonable royalty. Dkt. No. 192. The Court recognized in its  
 8 opinion that "comparisons of past patent licenses to the infringement must account for the  
 9 technological and economic differences between them." *Id.* at 27 (quoting *Wordtech Sys. v.*  
 10 *Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) (internal quotes  
 11 omitted)). Because Mr. Gemini's initial expert report contained "no analysis at all of the  
 12 economic differences between the 'significant patent agreements' and the license reached at the  
 13 hypothetical negotiation," the Court concluded that his opinion "should be excluded on this  
 14 ground alone." *Id.* at 29.

15 After receiving permission from the Court to try again, on January 31, 2012, Mr. Gemini  
 16 served his Superseding Expert Report ("Superseding Report"), in which he purported to revise his  
 17 initial damages opinion in light of the Court's December 1 Order. *See* Hicks, Decl., Ex. 1  
 18 (Superseding Rep.). Although he had previously denigrated DataQuill's prior licenses of the  
 19 patents-in-suit as "settlements" that could not be used to evaluate the outcome of a hypothetical  
 20 negotiation, in his Superseding Report, Mr. Gemini now contends that [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25

26 <sup>4</sup> At his most recent deposition, Mr. Gemini was still unwilling to opine that any of these  
 27 agreements either prove or tend to prove an established royalty for the patents-in-suit—which is  
 28 the *Georgia-Pacific* factor under which he considered them. *Id.*, Ex. 5 at 338:4-339:13 [105-  
 106].

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 III. ARGUMENT

11 A. Mr. Gemini continues to rely on prior licenses that are not comparable to the  
12 hypothetical agreement that would be reached between the parties.

13 Although, in his Superseding Report, Mr. Gemini relies on a different set of agreements to  
14 concoct a new (but still unreasonable) set of royalty rates, he fails once again to carry his burden  
15 of proving that the agreements upon which he seeks to rely are economically comparable to what  
16 would have emerged from a hypothetical negotiation in this case. Indeed, even Mr. Gemini  
17 apparently does not believe that the [REDACTED] agreements are economically  
18 comparable, because he studiously avoids saying so in his report. *See, e.g.*, Superseding Rep. at  
19 30 [31] [REDACTED] agreements provide information “that could be deemed useful  
20 ...”); *id.* at 23 [24] [REDACTED] “provides an indication as to a calculable royalty rate ...”); *id.*  
21 at 26 [27] [REDACTED] “provide information that would allow the  
22 application of a royalty rate”); *see also* Hicks Decl., Ex. 5 at 339:8-10 [106] (“In terms of my  
23 analysis, they don’t prove an established royalty or generally tend to prove an established royalty.  
24 They do provide information ... as to royalty rates ...”). Because the economic circumstances  
25 surrounding the [REDACTED] are all “radically different” than the [REDACTED]  
26 hypothetical agreement that would have been negotiated here, Mr. Gemini’s testimony must be  
27 excluded. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327-28 (Fed. Cir. 2009); *see also*

28

*ResQNet.com v. Lansa, Inc.*, 594 F.3d 860, 869-70 (Fed. Cir. 2010); *Wordtech Sys.*, 609 F.3d at 1319-20.

## 1. The Agreements.

These agreements are not in any way comparable to the license that would be negotiated as part of the hypothetical negotiation in this case.

#### **Different scope of license.**

Thus, even if DataQuill may properly use the total value

<sup>5</sup> See *Lucent Techs., Inc.*, 580 F.3d at 1330 (criticizing damages expert for relying on prior licenses without accounting for “whether the patented technology is essential to the licensed product being sold, or whether the patented invention is only a small component or feature of the licensed product”).

1 of handsets sold by HTC as its royalty *base*, Mr. Gemini cannot calculate a reasonable royalty  
 2 *rate* simply by applying the rates found in past agreements that have a different relationship to the  
 3 patented technology.<sup>7</sup> Because Mr. Gemini doesn't even attempt to adjust the royalty base (or  
 4 rate) for the HTC products to account for the more limited functionality provided by the  
 5 [REDACTED]—or even offer any way to show how such an  
 6 adjustment could be made—his use of non-comparable royalty rates is arbitrary and unreliable.  
 7

8       **Sales volumes are incommensurate.** Mr. Gemini also fails to account for vast  
 9 differences in sales volume. [REDACTED]  
 10 [REDACTED]

11       [REDACTED] This huge disparity is significant  
 12 because “[g]enerally speaking, the royalty rate and royalty base have an inverse relationship, so  
 13 that when the base goes down the rate goes up, and vice-versa.” *See Gargoyles, Inc. v. United*  
*14 States*, 37 Fed.Cl. 95, 103 (1997). Mr. Gemini purports to account for this volume-discounting  
 15 dynamic by suggesting that the lower sales volume “tends to lower the reasonable royalty to the  
 16 lower end of the range.” But he fails to explain why it is sufficient merely to use the “lower end  
 17 of the range” when the sales volume for HTC’s accused products is orders of magnitude greater  
 18 than the sales volume in [REDACTED]. That suggests that a whole  
 19 different range would be appropriate. Notably, even after supposedly accounting for differences  
 20 in sales volume, Mr. Gemini’s proffered minimum royalty rate of 0.6% [REDACTED]  
 21 [REDACTED]

22       **Amount of payment is radically different.** Mr. Gemini’s (unstated) assumption that the  
 23

24       <sup>7</sup> *See Lucent Techs., Inc.*, 580 F.3d at 1339 (“There is nothing inherently wrong with using the  
 25 market value of the entire product ... so long as the multiplier accounts for the proportion of the  
 26 base represented by the infringing component or feature.”); *see also Laserdynamics, Inc. v.*  
*27 Quanta Computer, Inc.*, Case No. 2:06-CV-348-TJW-CE, 2011 U.S. Dist. LEXIS 42590, at \*10  
 28 (E.D. Tex. Jan. 7, 2011) (to establish comparability, “Plaintiff must present evidence sufficient to  
 allow the jury to weigh the economic value of the patented feature against the economic value of  
 the features and services covered by the license agreement”).

1 [REDACTED] are comparable to the hypothetical agreement at issue here is  
2 also fundamentally at odds with the [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 [REDACTED]<sup>8</sup> In sharp contrast, DataQuill is presently seeking from HTC more than \$67 million in  
10 alleged past damages (\$45.5 million for the '304 patent alone), not to mention a penny for each  
11 and every dollar of total revenue it makes from selling mobile handsets into the future. Mr.  
12 Gemini fails to account for these differences, or even acknowledge them, because [REDACTED]

13 [REDACTED] plainly do not support the  
14 hyper-inflated running royalty figures stated in his report.

15       **2. The HP Agreement.**  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

---

<sup>8</sup> Companies that intend to exit the market, and indeed apparently never paid a cent in ongoing  
royalty payments, would have far different incentives when negotiating a running royalty than  
would HTC. Needless to say, a company that knows that it will never pay a running royalty on  
future sales has little incentive to bargain for a low (or even reasonable) running royalty rate.

1 [REDACTED]  
2 [REDACTED] Superseding Rep. at 23 [24]. But Mr. Gemini's analysis  
3 is so riddled with errors that it cannot pass muster under the *Daubert* standard. *See, e.g., Lucent*  
4 *Techs., Inc.*, 580 F.3d at 1330-31; *Wordtech Sys.*, 609 F.3d at 1319-20.  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
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1 [REDACTED]  
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13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

<sup>11</sup> See Hicks Decl., Ex. 5, at 427:19-25 [128]; see also Dkt. No. 135-2, Ex. 2 at 182:9-184:3.

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] See *Wordtech Sys., Inc.*, 609 F.3d at 1319-20; *Lucent*, 580 F.3d at 1329-30.  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED] Mr. Gemini ignores these agreements (and their negotiation history)—not because they  
17 are irrelevant to the hypothetical agreement at issue here—but because they would cast severe  
18 doubt on the inflated, result-driven damages opinions stated in his report. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED] [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 It is a “sound principle of law, commonly accepted” that “the patentee’s usual licensing  
 2 approach should be considered in assessing a reasonable royalty.” *Studiengesellschaft Kohle,*  
 3 *m.b.H. v. Dart Indus., Inc.*, 862 F.2d 1564, 1568 (Fed. Cir. 1988). But despite this venerable and  
 4 common-sense maxim, Mr. Gemini’s so-called “methodology” is colored by a transparent desire  
 5 to inflate his royalty calculation by glossing over DataQuill’s real-world licensing practices.  
 6 Under Mr. Gemini’s approach, it doesn’t matter that [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED] Nor is it instructive, according to Mr. Gemini, that [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED] This sort of evidence  
 13 sheds a great deal of light on what DataQuill sought—and was actually willing to accept—in the  
 14 real world, which is a far better guide as to the likely course of a hypothetical negotiation than  
 15 Mr. Gemini’s speculation. “The law should make sense even in a field as murky as hypothetical  
 16 negotiations to fix a reasonable royalty.” *Studiengesellschaft Kohle, m.b.H.*, 862 F.2d at 1568;  
 17 see also *Riles v. Shell Exploration & Production Co.*, 298 F.3d 1302, 1313 (Fed. Cir. 2002)  
 18 (vacating damages award when expert’s damages “models ignored [plaintiff]’s established  
 19 licensing practice”). Under Mr. Gemini’s approach, it does not.

20 Because Mr. Gemini’s cherry-picking methodology is not explained by any valid principle  
 21 of economic analytical method, his unreliable royalty calculation must be excluded for this  
 22 additional reason. See, e.g., *Fail-Safe, L.L.C. v. A.O Smith Corp.*, 744 F. Supp. 2d 870, 891 (E.D.  
 23 Wis. 2010) (excluding purported expert analysis when no explanation was provided for reliance  
 24 on cherry-picked data).

25       B.     **Mr. Gemini may not properly rely upon the [REDACTED]**  
 26                    **[REDACTED] to bolster his reasonable royalty opinion.**

27       In an effort to blackboard a number that might support his overreaching running royalty

1 opinion, Mr. Gemini purports to find a [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] is unsustainable and hopes to prevent it from infecting the remainder of his report.  
26 The Court should strike his opinion to the extent that he attempts to place reliance on this  
27 agreement in order to put a percentage figure larger than his unreasonable running royalty in front  
28

1 of the jury.

2 This is not the first time that Mr. Gemini has attempted to inject inappropriate material  
 3 into a jury's consideration by claiming that what he is advocating is simply a "reasonableness  
 4 check" on his main opinion. In *Uniloc*, the Federal Circuit held that Mr. Gemini had improperly  
 5 injected the total value of the products at issue while claiming that it was just a reasonableness  
 6 check. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011). *Uniloc*  
 7 argued on appeal that the total sales figure was brought in only as a check, and that the jury was  
 8 instructed not to base its decision on it. But the Federal Circuit rejected that "attempt[] to gloss  
 9 over the purpose of the check as lending legitimacy to the reasonableness of Gemini's \$565  
 10 million damages calculation." *Id.* at 1321. As the court explained, it was "of no moment" that  
 11 the entire market value was brought in only as a "check" because "even if the jury's damages  
 12 calculation was not based wholly on the ... check, the award was supported in part by the faulty  
 13 foundation ..." *Id.* So too here. As in *Uniloc*, Mr. Gemini's attempt to "skew the jury's damages  
 14 horizon" by presenting unreliable testimony concerning large (but entirely irrelevant) percentages  
 15 warrants the exclusion of his testimony. *Id.* at 1320.

16       **C.     Mr. Gemini cannot properly use the [REDACTED] license to value the patents-**  
 17       **in-suit.**

18       Despite the Court's conclusion that Mr. Gemini cannot properly use licenses between  
 19 HTC and industry giants, covering broad portfolios of patents, to calculate a reasonable royalty in  
 20 this case, Mr. Gemini continues to insist on relying upon HTC's license agreement with [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]  
 26 [REDACTED]

27       Mr. Gemini has made no attempt, however, to establish its comparability under binding

1 Federal Circuit precedent, or the Court's December 1 Order. To the contrary. In his Superseding  
 2 Report, Mr. Gemini expressly concedes that the second *Georgia-Pacific* factor is "inapplicable"  
 3 because he does not consider *any* of HTC's agreements, presumably including the [REDACTED]  
 4 [REDACTED] "to be comparable to the DataQuill and HTC hypothetical negotiation scenario."  
 5 Superseding Rep. at 31 [32]. Mr. Gemini also admitted in his deposition that he did not evaluate  
 6 his use of the [REDACTED] in light of the standards set forth in the Court's December 1  
 7 Order. Hicks Decl., Ex. 5 at 481:4-483:6 [141-42].

8 Even if the use of the [REDACTED] would be permitted under the Court's earlier  
 9 ruling concerning Mr. Gemini's attempted use of similar license agreements entered into for  
 10 broad patent portfolios (and it is not), Mr. Gemini's opinion is rendered unsound by his failure to  
 11 correctly perform a simple mathematical calculation. In his report, he notes that [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]

20 In HTC's initial motion, HTC did not attack Mr. Gemini's use of the [REDACTED]  
 21 agreement as a justification for enhanced royalty rates, but instead argued more generally that Mr.  
 22 Gemini's enhanced royalty rates were invalid because they lacked a sufficient factual basis.  
 23 Thus, the Court did not sanction Mr. Gemini's reliance on the [REDACTED] agreement when it  
 24 denied that portion of HTC's motion. Because the [REDACTED] agreement is admittedly not  
 25 comparable to the hypothetical agreement under consideration, Mr. Gemini should not be  
 26 permitted to rely upon it to justify his proffered 0.1% enhancement.

1       **IV. CONCLUSION**

2                  For the foregoing reasons, HTC respectfully requests the Court to exclude Mr. Gemini's  
3                  unreliable opinions and testimony from any trial in this case.

4

5                  Dated: March 12, 2012

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